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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 365

IN THE MATTER OF THE GILL-OWEN COMPANY,
Bankrupt.

THE HILLSBORO NATIONAL BANK,
Petitioner,

vs.

J. PAUL BUSCHER, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF THE GILL-OWEN CO., A BANKRUPT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Supreme Court of the United States:

Your petitioner, The Hillsboro National Bank, a banking corporation of the City of Hillsboro, Montgomery County, Illinois, by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit (R. 157), affirming the judgment of the United States District Court for the Southern District of Illinois, Southern Division (R. 128), which had reversed the judgment and decision of the Honorable Basil H. Coutrakon, Referee in Bankruptcy for said court, finding in favor of petitioner on its petition for reclamation, filed in said district court against respondent, J. Paul Buscher, Trustee in Bankruptcy of the Estate of the Gill-Owen Co., a corporation (R. 120).

STATEMENT.

This case arose out of a sale or transfer made on August 31, 1948, of the major portion of the personal assets of Litchfield Precision Products, a partnership, hereinafter referred to as the "partnership", to the Gill-Owen Company, a corporation, hereinafter referred to as the "corporation", which was adjudged a voluntary bankrupt in the United States District Court of the Southern District of Illinois, Southern Division, on February 7, 1950, and the matter was referred to the Honorable Basil H. Coutrakon, Referee in Bankruptcy, and respondent J. Paul Buscher is the duly appointed, qualified and acting trustee in bankruptcy of said bankrupt estate.

Said sale was made without any intention of, or attempt to comply with the provisions of the Bulk Sales Act of the State of Illinois, being Section 1, paragraph 78, Section 3, paragraph 80, and Section 4, paragraph 80a, Chapter 121½ Illinois Revised Statutes, 1947, as amended, State Bar Association Edition, also found in Smith-Hurt Illinois Annotated Statutes, in the same sections, paragraphs and chapters.

On June 14, 1950, petitioner and 18 other persons, firms and corporations filed petitions for reclamation against respondent, trustee in bankruptcy, alleging that they were creditors of such partnership on August 31, 1948, at which time said partnership sold or transferred substantially all of its personal assets to the corporation; that no notice was given, and there was no intention that notice be given to reclamation petitioners of the making of said sale or transfer, as required by the provisions of the said Bulk Sales Act of the State of Illinois; that the said sale was, therefore, void under the laws of the State of Illinois, and the

assets so sold by the partnership to said corporation, and which have since passed to its trustee in bankruptcy, were the property of the reclamation petitioners.

On June 22, 1950, the trustee in bankruptcy filed general denials to the petitions for reclamation, and as an affirmative defense alleged that petitioners were guilty of laches, ratification and estoppel by their conduct (R. 2, 5-8).

A petition was filed, and on June 29, 1950, an order entered by said referee authorizing the trustee in bankruptcy to sell all of the assets of the bankrupt at public sale, free and clear of all claims, liens, and encumbrances, and providing that all claims, liens and encumbrances should be transferred to the proceeds of the sale (R. 3).

After a hearing and submission on briefs, the referee in bankruptcy, on April 28, 1952, entered an order finding, that said partnership attempted to sell its personal property to the corporation without complying with the provisions of the Bulk Sales Act of the State of Illinois; that said attempted sale was made without any notice to any of the creditors of said partnership; that the reclamation petitioners were not guilty of waiver, estoppel, laches, or ratification; that petitioner and the other creditors who filed petitions for reclamation were at the time of the attempted sale, creditors of the partnership; that the trustee in bankruptcy had, as previously authorized, sold all the personal property in possession of the corporation for cash on condition, however, that the proceeds arising from the sale should be retained and kept separate by the trustee in bankruptcy in lieu of the property sold, and that the claims of petitioners had attached to the proceeds of such sale, and that said proceeds stand in lieu of the property sold, and that the proceeds of the said sale of said personal property be distributed under the further order of said referee in bankruptcy; that 90% of the personal assets of said corpo-

ration, so sold by the trustee in bankruptcy, came from the prior sale of the personal assets of the partnership to the corporation; that the petitions for reclamation filed on behalf of all of the other creditors of the partnership abide the result and decision of the referee upon the petition of petitioner for reclamation (as per stipulation by counsel for petitioner and counsel for respondent at the time of the hearing, R. 119); that the trustee in bankruptcy sold all the personal assets of the bankrupt corporation, 90% of which were assets coming into his hands through the sale of the personal assets of the partnership to the corporation, and on into the hands of the trustee in bankruptcy; that the trustee, therefore, has in his hands $20,546.33 in cash arising from the sale of said assets which should be distributed to the petitioning creditors of the partnership. It was then ordered, adjudged and decreed that the attempted sale by the partnership of its personal property to the corporation was fraudulent and void as to the creditors of the partnership, being the reclamation petitioners, and that the proceeds of said sale should be distributed to the reclamation petitioners in due course of administration (R. 120-121).

On the 7th day of May, 1952, a petition for review of the referee's said order was filed in the United States District Court, Southern District of Illinois, Southern Division (R. 122). The judge of the said district court, without hearing any evidence whatever, and without overruling any findings of fact made by the referee, ordered, adjudged and decreed that petitioner was estopped from asserting its claim for reclamation by reason of having accepted partial payment from said corporation, prior to its adjudication as a bankrupt, and which was made on the indebtedness of the partnership to petitioner (R. 125). Petitioner filed a motion for rehearing in said cause and said motion was denied on the 28th day of August, 1952 (R. 137). Petitioner thereafter perfected an appeal from the judgment of the

district court to the United States Court of Appeals for the Seventh Circuit, and on the 20th day of May, 1953, the said court of appeals affirmed the judgment of the said district court (R. 163). Petitioner thereupon filed its petition for rehearing in said cause, and its said petition for rehearing was thereafter denied on the 26th day of June, 1953 (R. 164), and it is from the judgment of said court of appeals, affirming the judgment of the district court in which rehearing has been denied that this writ of certiorari is sought.

The evidence shows that no written notice was given by either the partnership or the corporation ten days in advance of the day on which the transaction was closed, and the sale was, therefore, made void as to the creditors of the partnership by Section 1 of the Bulk Sales Act of the State of Illinois. The referee in bankruptcy expressly held said sale was void for failure of the corporation to give notice as required by said Bulk Sales Act. Neither the district court nor the court of appeals has questioned the finding and holding of the referee in bankruptcy on that question.

The consideration for the transfer of the assets from the partnership to the corporation was that the corporation assumed and agreed to pay all the debts and obligations of the partnership. At that time the partnership was indebted to petitioner in the sum of $34,500, and was likewise indebted to the other 18 creditors for large sums of money. Thereafter in February, 1949, the corporation, in compliance with its agreement, paid $1600 on the indebtedness of the partnership to petitioner, and in April, following, the corporation made a payment of $1000 on the indebtedness of the partnership to petitioner, and that reduced the indebtedness of the partnership to petitioner from $34,500 to $31,900, and said sum of $31,900 is evidenced by two promissory notes payable to petitioner, Exhibits JJ2 and JJ3, one of which was a note signed by Litchfield

Precision Products and D. E. Owen and E. A. Gill, for $17,900 and the other was a note signed by the same parties for the sum of $14,000. Those notes have never been paid, and the sum of the said notes represents the basis for petitioner's claim for reclamation. Making payment of said sums of $1600 and $1000 by the corporation on obligations of the partnership and thereby reducing the obligation of the partnership to petitioner from $34,500 to $31,900, is held by the court of appeals to have been an acceptance of benefits and acquiescence, and thereby estopped petitioner from proceeding with its claim for reclamation.

The evidence is that Gill and Owen, partners of the partnership, were the sole stockholders of the corporation, and officers of the corporation, and that both were actively engaged in the management of the affairs of both the partnership and the corporation, therefore, the corporation at the time said sale or assignment was made had full and complete knowledge of the fact that the corporation had assumed and agreed to pay the debts of the partnership. That when the corporation made the said two partial payments totaling $2600 in the spring of 1949 to petitioner, the corporation knew that it had assumed and agreed to make such payments, and that it knew as much or more about the transaction than petitioner did, since petitioner gained all his information from the officers and agents of the corporation at least one day after the said sale or transfer and agreement was made; therefore, it can not assert the defense of estoppel because it could not have been misled under such circumstances.

Both the district court and the court of appeals have held that said two payments totaling $2600 constitutes an acceptance of benefits and authorized the application of the doctrine of estoppel as a defense to petitioner's suit for reclamation.

There are at least three reasons why the defense is not available in this suit, viz.:

1. Where one has assumed the payment of the debt of another, for a valuable consideration, part payment of the debt and the receipt thereof by the creditor, does not constitute a defense under the laws of Illinois as announced by the decision of the Supreme Court of that State. The district court cited no decisions whatever in support of its holding that the law of estoppel was a defense. The court of appeals follows and relies upon the decision of the district court, and it further follows and relies on a headnote in 15 A. L. R. 937, based on decisions of the courts of other states, and on two appellate court decisions of Illinois, but since they do not establish the law of the State of Illinois, and being inconsistent therewith, the decision of the court of appeals is erroneous, in view of the decision of the Supreme Court of the United States in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 83 L. ed. 1188.

2. The trustee in bankruptcy of a corporation is not in position to plead estoppel because the corporation was aware of all of the facts and especially of its obligation to make not only partial payment, but full payment of the debt of the partnership, and it was, therefore, not misled or prejudiced in making the payments it had agreed to pay, simply because they were accepted by petitioner even will full knowledge of the agreement between the partnership and the corporation.

3. The partnership and the corporation entered into the agreement without the knowledge, consent or permission of petitioner. Under the agreement between the partnership and the corporation, the latter was simply doing what it had agreed to do when it made the payments totaling $2600 to petitioner, and petitioner in accepting said payments was entitled to receive the same, and the corporation should itself be estopped from questioning the

right of petitioner to receive, that which the corporation had agreed to pay to it.

OPINIONS BELOW.

Said court of appeals adopted the gist of the opinion of and affirmed the judgment of the district court, in an opinion by the Honorable Philip J. Finnegan concurred in by Justices Duffy and Lindley (R. 160-161), 204 Fed. (2d) 520. The memorandum opinion of the district court is unreported, but appears at R. 125. The unreported memorandum of the district court rendered at the time of the denial of the motion for a new trial or rehearing appears at R. 137. The opinion of the referee appears at R. 120. The opinion of the court appealed from appears as an appendix hereto (pp. 47, *infra*.).

JURISDICTION.

The judgment of said United States Court of Appeals for the Seventh Circuit was entered on the 20th day of May, 1953. The petition for rehearing filed in said cause was denied on the 26th day of June, 1953 (R. 164), from which date the right to file this petition for writ of certiorari is computed, and this petition for writ of certiorari was filed on the 23rd day of September, 1953, with the Clerk of the Supreme Court of the United States. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1); F. C. A. 28, Sec. 1254 (1); and Rule 38 (5-b) of the Rules of this Court.

STATUTES INVOLVED.

Section 1, paragraph 78, Section 3, paragraph 80, and Section 4, paragraph 80a, Chapter 121½, Illinois Revised Statutes, 1947, as amended, State Bar Association Edition, and also found in Smith-Hurd Illinois Annotated

Statutes, in the same sections, paragraphs and chapter; also found in the same sections, paragraphs, and chapter of Jones Annotated Statutes of the State of Illinois, and all being set forth in the appendix hereto, pages 54, *infra*.

The sections above cited are provisions of the so-called Bulk Sales Act of Illinois, and they are only incidentally involved in view of the fact that the court of appeals denied petitioner's right to recover under said sections on the ground that petitioner was guilty of acquiescence and estoppel, which obviated the application of said statute.

QUESTIONS PRESENTED.

1. Whether the decisions of the circuit court of appeals sustaining the trustee in bankruptcy's plea of equitable estoppel as a defense to petitioner's suit or claim for reclamation violates the rule of this Court announced in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 in following only the decision of the lower court, and the headnote in an annotation in 15 A. L. R. 2d 937, and when said lower court cited no authority whatever in support of its holding and when the said annotation is based only on decisions of courts of other states, or decisions of the appellate court, in view of the contrary holdings of the highest court of the State of Illinois in *Walker* v. *Wood*, 170 Ill. 463; *Burnett* v. *West Madison State Bank*, 375 Ill. 402; *Hayward* v. *Burke*, 151 Ill. 121; and *Kiefer* v. *Reis*, 331 Ill. 38.

2. Whether the trustee in bankruptcy is in a position to plead estoppel as a defense to petitioner's suit for reclamation because petitioner accepted two payments totaling $2600.00 from the corporation, which it had for valuable consideration assumed and agreed to pay for the partnership, when both petitioner and the corpora-

tion knew that said sale had been made without complying with the Bulk Sales Act of Illinois, and when petitioner had not expressly agreed to release its original debtor, the partnership, and its sureties on its notes evidencing the indebtedness assumed by the corporation and when petitioner has at all times since retained possession of said notes.

3. Whether petitioner is estopped by receiving payments from the corporation, when petitioner in receiving such payments was in any event entitled to receive the same, by virtue of the agreement between the corporation and the partnership requiring the former to make said payments.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

There are three reasons why this petition for writ of certiorari should be granted, viz.:

1. The Court of Appeals has avoided the application of the Bulk Sales Act of Illinois by following the decisions of courts of other states and reaching a result contrary to the rule of law established by the decisions of the highest court of Illinois which holds that the acceptance of partial payments by one who has assumed the debts of another does not release the original obligor from its obligation to its creditor.

Section 80a of the Illinois Bulk Sales Act provides that the creditor "may pursue his remedy either at law or in equity against the vendor or purchaser * * * jointly or severally or against * * * such stock or merchandise * * * or other goods and chattels, by a suit either at law

or in equity", and the court in which suit is brought is granted jurisdiction to adjust all equities. While said section grants to a creditor the right to recover under such statute, it makes no provisions relating to the nature of the pleadings to be filed by either the plaintiff or the defendant, nor does it attempt to say what shall constitute a defense to the action. All this is left to the rules of practice and to the decisions of the Supreme Court of the State of Illinois. Since the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 83 L. Ed. 1188, the said courts are bound by the decisions of the Supreme Court of Illinois in determining what the law is, and it is only in cases where the Supreme Court has not determined the question that the Federal Courts are permitted to determine the question as a matter of general law by considering the decisions of other states or of the appellate court of Illinois.

Whether petitioner is estopped by accepting payments from the corporation which has assumed and agreed to pay the debts of the partnership involves a consideration of the law of novation. "It is essential to a novation that all the parties to the contract for which the new one is substituted consent to it. *Walker* v. *Wood,* 170 Ill. 463; *Hayward* v. *Burke,* 151 Ill. 121; *Burnett* v. *West Madison State Bank,* 375 Ill. 402. The assent or agreement may be either express or implied, but neither knowledge of the arrangement between the corporation and the firm, nor the partial payment of the debt, nor a demand for the payment, like the filing of the claim against the corporation, nor all combined, necessarily establishes such assent or agreement as a legal conclusion." *Walker* v. *Wood,* 170 Ill. 463, 467, citing 16 Am. & Eng. Ency. of Law, 904; *Rayburn* v. *Day,* 27 Ill. 46; *Goodenow* v. *Jones,* 75 id. 48; *Hayward* v. *Burke, supra.* See also *Burnette* v. *West Madison State Bank,* 375 Ill. 402. See also *Northwestern Mutual Life Ins. Co.* v. *Eddleman,* 247 Ky. 116, 56 S. W. (2d) 561, 87 A. L. R. 276, and exten-

sive annotation on the question here involved following said decision in said A. L. R. beginning at page 281. Under the well established law of Illinois the petitioners accepting payment from the corporation, did not release the partnership from the payment of its debt to petitioner; equity must follow the law and therefore, estoppel is unavailing to either the partnership or the corporation as a defense to the petition for reclamation.

The court of appeals should have followed the rules well settled by the decisions of the Supreme Court of Illinois, as required by the rule announced in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 83 L. Ed. 1188, and since followed by many decisions by said court, holding that the court of appeals must apply the rule of law announced by the decisions of the highest court of the state to be the law governing all transactions, rather than consider the decisions of cases of other states for the purpose of determining for itself what the law is or should be. The failure or refusal of the court of appeals in this case to comply with the rules of the decision in said *Erie R. Co.* v. *Tompkins, supra,* and other cases since decided, is, therefore, grounds for the granting of this Writ of Certiorari to review the decision of the Court of Appeals under Rule 38 (5-b), U. S. Supreme Court Rules, which, among other things, provides: "That where a court of appeals has decided an important question of local law in a way probably in conflict with the applicable local decisions or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision," by granting writ of certiorari.

2. The corporation had knowledge of the fact that it had assumed and agreed to pay the debts of the partnership. In making payments on its agreement and the acceptance of such payments by the petitioner did not mislead it in the least. Unless it was misled in some manner with reference to the facts, neither estoppel, equitable estoppel, nor quasi estoppel are available to it as a defense.

The estoppel relied upon by the Court of Appeals as a defense to petitioner's suit is not an estoppel at all. The estoppel relied upon should evidently have been designated either as an equitable estoppel or a quasi estoppel, but neither equitable estoppel or quasi estoppel constitute a defense to petitioner's right to recover under it, petition for reclamation. 19 Am. Jur. 692, Section 65 "Estoppel". See also *Grand Trunk etc.* v. *Nelson,* 116 Fed. (2d) 22, opinion by Judge Kerner, concurred in by Judges Evans and Major of the United States Court of Appeals for the Seventh Circuit, in which certiorari was denied by this Court, 232 U. S. 761, 89 L. Ed. 609. If we treat the acceptance of payments as being quasi estoppel then the same rule applies against its application here because estoppel is only a defense when the party claiming the estoppel is without knowledge or means of the knowledge on which he bases his claim of estoppel. 31 C. J. S. 349, Estoppel, Section 109 (b).

Under these rules the corporation could not plead estoppel as a defense to the suit filed for reclamation because the corporation was charged with full knowledge of all the terms and conditions of the contract which it assumed and agreed to pay, and therefore knew when it was making these payments it was doing what it had agreed to do. It had equally as much knowledge as petitioner did concerning the facts.

3. Petitioner was not estopped even by the application of quasi estoppel from receiving said payments on its debt, because the doctrine of estoppel never applies when one is only receiving that which he is legally entitled to receive in all events.

The corporation for good and valuable consideration has assumed and agreed to pay the debts and obligations of the partnership, including the sum of $34,500 due to petitioner. The corporation in making said payments totaling $2600 on the indebtedness of the partnership to petitioner was complying with its agreement, and in making said payments, the corporation was only receiving and accepting what it was legally entitled to receive in any event, and receipt of said payments under such circumstances does not constitute estoppel. 19 Am. Jur. 692, Section 65, under the subject of "Estoppel"; see also *Grand Trunk, etc.* v. *Nelson*, 116 Fed. (2d) 22, opinion by Judge Kerner, concurred in by Judges Evans and Major of the United States Court of Appeals for the Seventh Circuit, in which certiorari was denied by this Court, 232 U. S. 761, 89 L. Ed. 609. The same rule applies whether the estoppel relied upon was technical estoppel, equitable estoppel, or quasi estoppel. 31 C. J. S. 350 Estoppel Sec. 109 (b).

Under the rule of law above stated, accepting payments, under such circumstances and when it was only obtaining that which it was legally entitled to receive in all events, the defense of estoppel, equitable estoppel and quasi estoppel were not defenses and certiorari should be granted.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court a full and complete Transcript of the Record and of the proceedings of said court of appeals had in the case

numbered and entitled on its Docket No. 10734, *In the Matter of the Gill-Owen Company, a bankrupt, The Hillsboro National Bank, Appellant,* vs. *J. Paul Buscher, Trustee in Bankruptcy of the Estate of the Gill-Owen Company, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said United States Court of Appeals for the Seventh Circuit be reversed by the Court and for such further relief as to this Court may seem proper.

Dated this 23rd day of September, 1953.

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